IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

No. 719

MAMMOTH OIL COMPANY, SINCLAIR CRUDE OIL PURCHASING COMPANY and SINCLAIR PIPE LINE COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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JOHN W. LACEY,
MARTIN W. LITTLETON,
GEORGE P. HOOVER,
PAUL D. CRAVATH,
C. T. STANFORD,
HERBERT V. LACEY,
J. W. BEVILL,
E. W. HAGLAND,
DOUGLAS H. MOFFAT,
Solicitors for Mammoth Oil Company.

EDWARD E. CHAMBERS,
RALPH W. ARNOLD,
Solicitors for Sinclair Crude Oil Purchasing Company and Sinclair Pipe Line Company, Petitioners.

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Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

The joint and several petition of MAMMOTH OIL COMPANY, SINCLAIR CRUDE OIL PURCHASING COMPANY and SINCLAIR PIPE LINE COMPANY for a Writ of Certiorari to review the decree and judgment of the United States Circuit Court of Appeals for the Eighth Circuit, entered in the above entitled cause on October 12, 1926 (R. p. 852), reversing the decree and judgment of the District Court of the United States for the District of Wyoming (R. pp. 271-276).

Statement of the Case.

This is a suit in equity begun in the United States District Court for the District of Wyoming on March 13, 1924, against your petitioners by the United States of America,

by and through special counsel appointed by the President of the United States under special congressional authority therefor. The object and prayer of the bill of complaint is to cancel two certain contracts as follows:

> (a) A contract, dated April 7, 1922, whereby the United States leased to your petitioner Mammoth Oil Company, Naval Petroleum Reserve No. 3, otherwise known as the Teapot Dome, reserving to the United States royalties in the form of stipulated percentages of the oil produced, and also making disposition of these royalties to the lessee, with certain options reserved to the United States as to equivalents to be by it received for the royalty oils (R. pp. 14-36).
>
> (b) A supplemental contract, dated February 9, 1923, by which the United States under the options reserved in the lease, exchanged with the lessee the royalty oils accruing under the lease for fuel oil and other oil products suitable for use by the United States Navy, together with the necessary storage facilities therefor (R. pp. 36-51).

The bill, briefly stated, complains (a) that the contract of April 7, 1922, and the supplemental agreement of February 9, 1923, were without authority of law and were not made in compliance with law (R. p. 6, par. 14 and p. 8, par. 41); (b) that the said contracts were obtained by fraud (R. p. 10, par. 28).

It is alleged in the bill that your petitioners, Sinclair Crude Oil Purchasing Company and Sinclair Pipe Line Company, have acquired certain rights and interests from

your petitioner Mammoth Oil Company, under which they have erected certain structures on the lands and that they are without right and are trespassers upon the lands (R. p. 11, par. 32-33).

Your petitioner Mammoth Oil Company answered, denying all allegations upon which cancellation was claimed (R. pp. 55-69). Your petitioners Sinclair Crude Oil Purchasing Company and Sinclair Pipe Line Company denied knowledge of any of the matters alleged for cancellation and upon such lack of knowledge put in issue the said matters. In its answer the Pipe Line Company further alleged an assignment by Mammoth Oil Company of rights and privileges on Government land contained in the lease and that the United States consented to the assignment, and that relying thereon it placed its lines and structures on the leased land at a cost of more than $700,000. In its answer the Sinclair Crude Oil Purchasing Company further alleged the purchase by it from Mammoth of certain storage tanks on the land, relying on the validity of the lease and without knowledge of any alleged fraud (R. pp. 69-84).

For brevity and convenience, we will herein refer to the United States District Court for the District of Wyoming as the District Court and to the United States Circuit Court of Appeals for the Eighth Circuit as the Court of Appeals.

The case was tried in the District Court, resulting in findings for your petitioners on all issues and a decree dismissing the bill (Opinion, R. pp. 225-271; Findings and Decree, R. pp. 271-276).

An appeal from the District Court was taken by the United States to the Court of Appeals and that court, as

we understand its opinion (R. pp. 811, 816), confirmed the findings of the District Court to the effect that neither of the contracts was without authority of law and that neither of them was made without compliance with law, but reversed the findings of the District Court on the question of fraud and found that the contracts were fraudulently obtained, and remanded the case, with instructions to the District Court "to enter a decree (a) cancelling said lease and contract as fraudulent, (b) enjoining appellees from further trespassing upon the lands of appellant described in said lease, and (c) providing for an accounting on the part of appellee, Mammoth Oil Company, for the value of all oil and other petroleum products taken under said lease and contract" (R. p. 851).

For some years prior to February 25, 1920, the United States had no policy as to the disposition of its oil lands, the known oil lands having been withdrawn in 1909 and 1910 from entry and appropriation under the general mining laws, in aid of further legislation whereby a better disposition of them could be made than was found in said laws (*U. S.* v. *Midwest Oil Co.*, 236 U. S. 459, 485). On February 25, 1920, after the above pause, Congress enacted the General Leasing Law (41 Stat. L. 437) authorizing the leasing of public oil lands and vesting the administration of the law in the Secretary of the Interior. This general law excluded the naval petroleum reserves except that it contained in section 18 provisions authorizing the Secretary of the Interior under certain conditions, to lease producing wells on the reserves and perhaps additional areas.

Shortly after the Act of February 25, 1920, and at the same session, Congress passed the Act of June 4, 1920,

dealing specially with the naval petroleum reserves, in the words following:

> "Provided That the Secretary of the Navy is directed to take possession of all properties within the naval petroleum reserves as are or may become subject to the control and use by the United States for naval purposes, and on which there are no pending claims or applications for permits or leases under the provisions of an Act of Congress approved February 25, 1920, entitled 'An Act to provide for the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain,' or pending applications for United States patent under any law; to conserve, develop, use, and operate the same in his discretion, directly or by contract, lease or otherwise, and to use, store, exchange, or sell the oil and gas products thereof, and those from all royalty oil from lands in the naval reserves, for the benefit of the United States; And provided further, That the rights of any claimant under said Act of February 25, 1920, are not affected adversely thereby: And provided further, That such sums as have been or may be turned into the Treasury of the United States from royalties on lands within the naval petroleum reserves prior to July 1, 1921, not to exceed $500,000, are hereby made available for this purpose until July 1, 1922; Provided further, That this appropriation shall be reimbursed from the proper appropriations on account of the oil and gas products from said properties used by the United States at such rate, not in excess of the market value of the oil, as the Secretary of the Navy may direct" (41 Stat. L. 813).

Inasmuch as the Secretary of the Navy was without the personnel skilled and experienced in dealing with oil lands,

and such personnel existed in the Interior Department (R. p. 430), the President of the United States on May 31, 1921, issued an order called in the bill of complaint the Executive Order, concluding as follows:

> "The Secretary of the Interior is authorized and directed to perform any and all acts necessary for the protection, conservation and administration of the said reserves, *subject to* the conditions and limitations contained in this order and *the existing laws* or such laws as may hereafter be enacted by Congress pertaining thereto" (Italics supplied.) (R. pp. 13-14.)

Under this order the personnel in the Interior Department and the Secretary of the Interior himself were coordinated with and aided the Navy Department and the Secretary of the Navy in the matter of negotiating the contracts in suit.

The bill of complaint charges that the Executive Order was invalid, illegal and of no force or virtue in law and that the same was procured by Secretary Fall and Harry F. Sinclair by fraud and misrepresentation (R. pp. 5-6, pars. 9-12). These grave allegations with reference to the invalidity and the procurement by fraud of the Executive Order, impeaching a Cabinet officer and reflecting upon the President himself, were denied by the answers (R. pp. 57-58, pars. 9-12).

Both courts, as we understand the decisions, found that the Secretary of the Navy exercised such authority and control in the negotiation and execution of the contracts as to fulfill the requirements of the Act of June 4, 1920.

The terms of the lease made by the Secretary of the Navy were unquestionably favorable to the Government

and onerous to the lessee. This appears by (a) affirmative evidence from witnesses called by the United States (R. p. 347, l. 20; p. 403, l. 15; p. 712, l. 14); (b) the fact that no evidence was offered by the United States against the terms of the lease; (c) the fact that neither the District Court nor the Court of Appeals found that the terms of the lease were unfavorable to the Government.

The District Court, in discussing the lease, said:

> "There is the significant lack of material damage to the Government which usually attends allegations of fraud, for in the case at bar no attempt has been made to show that the lease in controversy was in itself a bad lease for the government, except perhaps theoretically by counsel, but on the other hand the testimony of the plaintiff's own witnesses who are competent to speak upon the subject, tends to show that it is a lease much more favorable to the Government than they as oil operators would be willing to assume. These elements are perhaps not controlling in a case of this character, but they are at least worthy of mention as being conspicuous because their presence is usually the basis of relief sought in cases of this kind" (R. p. 248).

The Court of Appeals, speaking through Judge Kenyon, on the same subject said:

> "If a Government official, engaged in making contracts for the Government, receives pecuniary favor from one with whom such contracts are made, a fraud is committed on the Government, and *it matters not that the Government is subjected to no pecuniary loss or that the contract might have been an advantageous one to it*" (Italics ours). (R. p. 817.)

Reasons for Granting the Writ.

The reasons why the writ should issue are:

1. In arriving at the conclusion that fraud had been established, the Court of Appeals, in a way untenable and in conflict with the weight of authority, decided important questions of law relating to the matter of drawing inferences.

2. The Court of Appeals, in a way untenable and in conflict with the weight of authority, held that certain records and other documents were competent evidence.

3. The Court of Appeals erred in construing the words "directed * * * to conserve, develop, use and operate" contained in the Act of June 4, 1920, to be permissive rather than mandatory. The matter of such construction constitutes an important question of federal law which has not been, but should be, settled by this Court.

4. The Court of Appeals decided an important question of general law in a way untenable and in conflict with the weight of authority, in denying the right of Mammoth Oil Company to receive credit for the value of things received by the United States under the contracts.

5. The decree is inequitable as to Sinclair Pipe Line Company and Sinclair Crude Oil Purchasing Company.

6. The case is of great public importance.

1.

Unlawful Inferences.

The Question of Fraud.

As to the fraudulent procurement of the contracts, the Court of Appeals stated the point as follows:

> "It is the theory of the Government, bluntly stated, that Secretary Fall received from Harry F. Sinclair, sole owner of appellee, Mammoth Oil Company, a pecuniary consideration which influenced him in granting to said Oil Company a lease of Naval Petroleum Reserve No. 3, commonly known as "Teapot Dome." Counsel for the United States charge in their brief that Mr. Sinclair received as dividends from the Continental Trading Company, Ltd., $230,500,00 face value of United States Liberty First 3½% Bonds, which he turned over to Secretary Fall in May, 1922, as a bribe" (R. p. 816).

There is no Conflict in the Evidence.

The District Court found that there was no conflict in the evidence on the question of fraud (R. pp. 228-9). In like manner the Court of Appeals finds that there is no conflict in that evidence. The language of the Court of Appeals is as follows:

> "The views of the trial court are not controlling as the situation presents, not so much a dispute as to the evidence or the veracity of witnesses as it does an opportunity for differences of opinion in respect to the inferences to be drawn from all the circumstances appearing in the record. This Court

> has the same right to draw conclusions from the silence or evasiveness of witnesses as has the trial court * * *. Further, the conclusion of the trial court as to fraud is a mixed one of law and fact" (R. p. 818).

The Court of Appeals Drew Unlawful Inferences.

The Court of Appeals found no direct evidence of fraud but based its conclusions solely upon inferences (R. p. 838). Our contention is that in reaching its conclusions, the Court violated well known and fundamental rules of evidence in relation to inferences in that (a) it drew sinister inferences from given circumstances when inferences consistent with honesty were more reasonably to be drawn therefrom; (b) it drew unauthorized sinister inferences against your petitioners from failure and refusal to testify on the part of witnesses called by the United States; (c) it drew unauthorized sinister inferences from failure of your petitioners to call witnesses, and (d) drew inferences from inferences.

Illustrations of Unlawful Inferences.

(a) As we have seen *supra* the central element in the claim of fraud by counsel and in the finding of fraud by the Court of Appeals, relates to Liberty Bonds. Counsel claim, and the Court of Appeals finds, that in April, 1922, the Continental Trading Company, Ltd., purchased $300,000 of First 3½% Liberty Bonds, and that in May, 1922, $230,500 of First 3½% Liberty Bonds, some of which were included in the bonds purchased by the Continental Trading Company, Ltd., were found in the possession of Secretary Fall's son-in-law Everhart. Counsel claim, and the Court of Appeals finds, that said bonds were delivered or caused to be

delivered to Secretary Fall by Mr. H. F. Sinclair. This claim and finding is based upon the following evidence:

In New York on November 14, 1921, and prior to any meeting between Secretary Fall and Mr. Sinclair, and prior to any thought of leasing Teapot Dome on Mr. Sinclair's part, so far as the evidence discloses, H. M. Blackmer, after some previous negotiations, "made a deal" with A. E. Humphreys for the purchase of approximately thirty-three million barrels of oil. No one was present at the time of this deal excepting Mr. Blackmer and Mr. Humphreys. After the deal had been completed by parol, Mr. Humphreys telegraphed Senator Charles S. Thomas, his attorney, to come to New York and reduce the contract to writing (R. p. 452). On November 17, after Senator Thomas had arrived, Mr. Blackmer stated to Senator Thomas and Mr. Humphreys that the purchaser to be designated in the contract would be Continental Trading Company, Ltd., a Canadian corporation (R. p. 452). Mr. J. E. O'Neil, representing the Prairie Oil & Gas Company, and Mr. R. W. Stewart and Mr. H. F. Sinclair, representing Sinclair Crude Oil Purchasing Company, were present when the contract was to be reduced to writing on November 17 (R. pp. 445-7) and additional contracts were to be made and were made as follows: One whereby Sinclair Crude Oil Purchasing Company and Prairie Oil & Gas Company jointly purchased from Continental Trading Company at an advance of twenty-five cents per barrel the oil purchased by Continental from Mr. Humphreys (R. pp. 454-6), and one whereby Sinclair Crude Oil Purchasing Company and Prairie Oil & Gas Company purchased from the Humphreys Company additional amounts of oil (R. pp. 448-50). When Blackmer named Continental Trading Company, Ltd., as

his nominee to be designated as purchaser in his contract with Humphreys, some question arose as to the financial responsibility of the Continental. The statement was then made by Mr. O'Neil that the Prairie Oil & Gas Company and the Sinclair Crude Oil Purchasing Company were to buy the oil and would guarantee the performance of the contract. His language was: "We will receive that oil—we expect to pay for it and we will guarantee the performance of the contract" (R. p. 444). The guaranty in writing was affixed to the contract (R. p. 447 8).

Senator Thomas, a witness for the United States, after testifying concerning the matters above, said:

> "I don't know who constituted the Continental Trading Company, Ltd., except that Mr. Osler appeared there as an officer of it. I did know that the Prairie Oil and Gas Company was interested there in making another contract with Mr. Humphreys to take effect at the close of the first contract and that the Sinclair Crude Oil Company was represented jointly with the Prairie Oil and Gas in the purchase of that remaining oil. I assumed that from the presence of Mr. Sinclair. That purchase was accomplished right there. I do not know whether Mr. Sinclair or Mr. O'Neil had any other interest than that." (R. pp. 451 2).

On the same subject, Mr. Humphreys, also a witness for the United States, testified as follows:

> "I had no knowledge who constituted or were interested in the Continental Trading Company other than Mr. Osler.
>
> "I know there was another contract executed there the same day, and that one of the parties to

> that other contract aside from my companies was the Prairie Oil & Gas Company and the other party was the Sinclair Crude Oil Purchasing Company. Stewart and Sinclair represented the Sinclair Crude in making this contract and O'Neil represented the Prairie. I had no knowledge of any other purpose of their being there." (R. pp. 453-4).

Mr. Osler testified that he was asked by someone whom he designated as his client, to incorporate the Continental Trading Company for the purpose of having that company purchase the oil from Mr. Humphreys. He declined to state the name of his client (R. p. 512). His client disclosed to Mr. Osler the names of his associates who were interested with him in the matter (R. p. 504). Speaking with reference to the meeting on November 17 in New York, Mr. Osler testified:

> "I saw some at least of the persons named to me by my original client in the matter, whose name I am not at liberty to disclose." (R. p. 515)

He further says:

> "If I saw Sinclair in New York he was a total stranger to me. I had never seen him before and did not know him by sight. I don't think I know his name even and it made no impression upon me and I can't visualize him at the meeting with anybody I met in New York on that occasion. It is quite possible he was at one or more of these meetings and of course I don't know, but speaking from recollection it does not come into my mind at all. As to whether James O'Neil was present at these meetings in New York, I am not making any statement as to any other persons that I saw there. I must refuse to

do that. I have merely made this statement as to Sinclair in order to clear up what otherwise might be a misunderstanding." (R. pp. 514-5)

This is the whole of the evidence from which the inference is drawn that Mr. Sinclair was connected with or in any manner interested in the Continental Trading Company, Ltd. He was not present when the deal was made by Blackmer for the purchase of oil from Humphreys, but was present at the meeting when the contract carrying out the parol deal was reduced to writing. A valid reason for his presence on the latter occasion is given by the Government's witnesses. Mr. Sinclair and Mr. R. W. Stewart were acting for the Sinclair Crude Oil Purchasing Company, first in purchasing in conjunction with the Prairie Oil & Gas Company the oil from Continental Trading Company, Ltd., which that company as nominee of Blackmer, had bought from Humphreys, and second, in purchasing in conjunction with the Prairie Oil & Gas Company additional amounts of oil from Humphreys. Both of these contracts last mentioned were introduced in evidence by the United States as a part of its case, one of them in direct connection with the above testimony of Humphreys and Thomas, and the other immediately following that testimony (R. pp. 448-50; 454-6).

Notwithstanding the uncontradicted evidence given by the witnesses for the United States, Humphreys and Thomas, showing reasons for the presence of Mr. Sinclair, consistent with the highest integrity on his part, and showing nothing inconsistent therewith, the Court of Appeals drew the inference solely from this evidence, that he was interested in the Continental Trading Company, Ltd., and

therefore a seller of the oil to Sinclair Crude Oil Purchasing Company which he and Stewart were there representing in the purchase in conjunction with Prairie Oil & Gas Company represented by O'Neil, and this inference is the keystone of the arch upon which the Court of Appeals built all its inferences that these petitioners or any of them were guilty of fraud.

(b) One Everhart, a witness called by the United States, claimed his constitutional privilege against self-incrimination and from this, although there was no evidence of collusion or concert of action relating to such refusal between the witness and your petitioners or any of them or anyone representing them, the Court of Appeals drew the unauthorized inference that Everhart could not have obtained by purchase the bonds which the Court found were in his possession in May, 1922, and from that inference drew an inference of fraud against your petitioners.

(c) One H. M. Blackmer and one James E. O'Neil were called as witnesses for the United States under proceedings to take their depositions in France. They declined to testify, as under the French Law they were entitled to do (R. p. 547, lines 35-38; p. 548, lines 26-29). There was no evidence of any kind that in so refusing to testify, they or either of them were acting in concert or collusion with your petitioners or any one representing any of them, and yet from their mere declination to testify the Court of Appeals drew inferences of fraud against your petitioners.

(d) One H. S. Osler, a Canadian barrister, was called as a witness for the United States who sought his deposition at Toronto, Canada, and on the ground that communi-

cations with his client (who was not shown to be any of your petitioners or anyone representing them or any of them) were privileged, he declined to answer certain questions and yet such declination was used as a basis from which to infer fraud against your petitioners.

(e) Albert B. Fall, former Secretary of the Interior, was not called as a witness by the United States; nor was he called as a witness by your petitioners. The fact that he was not called as a witness by your petitioners was used by the Court of Appeals as a basis for inferences of fraud against your petitioners.

(f) Harry F. Sinclair was not called as a witness by either party. The fact that he was not called by your petitioners was used as the basis from which inferences of fraud are found against your petitioners although there was no evidence introduced connecting him with the Continental Trading Company, Ltd., or with any of the Liberty Bonds claimed to have been purchased by it or claimed to have been found in the possession of Everhart.

(g) From the above inferences that Mr. Sinclair was interested in the Continental Trading Company, Ltd., and that Everhart did not obtain by purchase the bonds mentioned, the Court of Appeals by a series of inferences bridging between these two, reached its conclusions of fraud. It was inferred from Mr. Sinclair's inferred interest in Continental Trading Company, Ltd., that he was entitled to share in the profits made by Continental Trading Company, Ltd., on the resale of the Humphreys oil to the companies represented by Mr. Sinclair, Mr. Stewart and Mr. O'Neil. It was then inferred from the above infer-

ences that these profits, or some of them, were distributed among the shareholders as early as May, 1922, as there is no evidence of any such distribution. It was next inferred from these inferences that Mr. Sinclair received his inferred share of profits of the Continental Trading Company, Ltd., in Liberty Bonds. It was next inferred from the inferences just above mentioned, from inferences based upon failure or refusal to testify of witnesses called by the United States, and from failure of your petitioners to call Mr. Fall and Mr. Sinclair as witnesses, and from an inference that Mr. Sinclair was the only one of those present at the execution of the contract between Continental Trading Company, Ltd., and Humphreys who could have had any motive to deliver Liberty Bonds to Fall, that Mr. Sinclair, for a fraudulent purpose, transferred the bonds inferred to have been so received by him, or some of them, to Everhart or Fall, or both.

2.

Certain Incompetent Evidence Used as Basis for Inferences.

We submit further, that in drawing its inferences and reaching its conclusions the Court of Appeals, over the objections of your petitioners, used and weighed against your petitioners incompetent evidence. Many entries and records of a private character in books and records of banks and brokers and other private persons, entire strangers to the case, made in the absence of your petitioners or any of them or any of their representatives, to

which none of your petitioners nor anyone representing any of them were parties, were admitted in evidence by the District Court subject to the objections as to each of them, that the same was not in any way connected with your petitioners or anyone representing them, that it was *res inter alios acta* and that it was in the nature of hearsay as to your petitioners (R. pp. 742-3).

Leave to move to strike such evidence was reserved and a motion to strike was made in accordance with the leave granted (*ibid*). The incompetent evidence was as follows:

	Plff.'s Exhibit	*Record Page*
1. Ledger sheets of Dominion Bank of Canada in account between that bank and Continental Trading Company, Ltd.	138	488-9
2. Brokers' bills purporting to show sales of Liberty Bonds by Rhoades & Co., Walker Bros. and Saloman Bros. & Hutzler to Dominion Bank of Canada	140	489-91
3. Original record sheets of Saloman Bros. & Hutzler consisting of receipt and delivery sheets purporting to show a sale of Liberty Bonds by said firm to Dominion Bank of Canada	141	494-5
4. Records of Rhoades & Co. consisting of cashier's memorandum of receipt of certain Liberty Bonds purchased by Rhoades & Co. from First Trust & Savings Bank of Chicago through First National Bank of New York; cancelled check of Rhoades & Co. to the order of First National Bank; cashier's memorandum of delivery by Rhoades & Co. to Dominion		

	Plff.'s Exhibit	*Record Page*
Bank of Canada of $50,000 Liberty Bonds and copy of letter from First Trust & Savings Bank of Chicago to Rhoades & Co.	142	497–9
5. Certain record sheets of Central Union Trust Co. of New York showing sales to Walker Bros. of certain Liberty Bonds by Central Union Trust Company	143	502–3
6. Ledger sheets of First National Bank of El Paso, Texas, purporting to show account between that bank and A. B. Fall	109	435
7. Deposit tickets made by First National Bank of El Paso, Texas, in account with A. B. Fall	110	437
	111	438
8. Ledger sheets of First National Bank of Pueblo, Colorado, purporting to show account between that bank and Tres Ritos Cattle & Land Co.	112	439
9. Deposit tickets made by First National Bank of Pueblo, Colorado, in account between that bank and Tres Ritos Cattle & Land Co.	113	
	114	535
10. Bill of sale from Logan & Bryan to First National Bank of Pueblo, Colorado, of certain Liberty Bonds, together with a memorandum made by said bank in connection with said bill of sale	115	535–6

	Plff.'s Exhibit	*Record Page*
11. Deposit ticket made by First National Bank of Pueblo, Colorado, in account between that bank and M. D. Thatcher Estate Company	119	536–7
12. Deposit ticket made by Exchange Bank of Carrizozo, New Mexico, in account between that bank and A. B. Fall	144	541–2
13. Ledger sheets of Exchange Bank of Carrizozo, New Mexico, purporting to show account between that bank and A. B. Fall	145	542
14. Duplicate of credit returns sheet kept by Exchange Bank of Carrizozo, New Mexico, showing various items forwarded by that bank for collection	146	542–3

The District Court considered the case as though all this evidence were competent and found for your petitioners with that evidence in the scale but upon consideration felt that the evidence was open to the objections made and held that it should be stricken out. It was by the Court of Appeals considered and weighed as competent evidence of facts and circumstances from which the Court drew its inferences of fraud.

3.

The Act of June 4, 1920.

We further contend that the Act of June 4, 1920 "directed" the Secretary of the Navy to conserve, develop, use and operate the properties within the naval reserves. The Court of Appeals in its opinion construes this provision of the Act not as mandatory but as permissive. The statute is still in force and is, as we contend, obligatory. It is a statute of great importance to the United States and to the Navy Department and to the public, which has not yet been construed by this Court.

4.

Shall the United States Do Equity?

Furthermore the Court of Appeals has decided an important question of general law in denying the right of your petitioner Mammoth Oil Company, in equity and good conscience to receive credit for the things received by the Government under the contracts, which the record shows was of a value in excess of $1,000,000. The general rule of law is that he who seeks equity must do equity and he who would rescind a contract for any cause may not retain without compensation values by him received under the contract.

5.

As to Sinclair Pipe Line Company and Sinclair Crude Oil Purchasing Company.

The bill alleges no fraud against Sinclair Pipe Line Company or Sinclair Crude Oil Purchasing Company. Neither in the bill nor in any claim of counsel nor in the evidence is there any charge of fraud against those companies. It is merely charged that they are trespassers.

In cancelling the easements and rights of way of the Pipe Line Company and confiscating without compensation its structures, the Court of Appeals says:

> "Its stock is owned by the Sinclair Consolidated Oil Corporation and the Standard Oil Company of Indiana in equal proportions. Mr. Sinclair is or was Chairman of the Board of Directors of Sinclair Consolidated Oil Corporation and probably its largest stockholder" (R. p. 880).

There was no evidence in the record on which to base a finding that Mr. Sinclair was *probably* the largest stockholder of Sinclair Consolidated Oil Corporation but the Court thereupon decided that Sinclair Pipe Line Company is a trespasser *mala fide* on the Reserve and not entitled to any accounting for the amount expended by it in constructing its pump station and pipe line thereon.

The record shows that the pipe line of Sinclair Pipe Line Company is a common carrier line over seven hundred miles in length, connecting the Salt Creek Oil Field of

Wyoming with trunk pipe lines in the Middle West, thus affording important markets to the oil producers and owners in Salt Creek Field, including the United States. The main pumping station of the line is located on the Reserve. The decree of the Court of Appeals peremptorily enjoins further trespass by Sinclair Pipe Line Company and thus gives that company no opportunity to procure a right of way whereby the line and structures may be kept on the Reserve, and in effect enjoins the removal of the structures and line from the Reserve. This not only confiscates the structures of the Pipe Line Company without compensation, but in practical effect stops operation of the whole line to the detriment of the oil owners and producers in the Salt Creek Field.

6.

Public Importance of the Case.

The charge of bribery of a Cabinet Officer, involving also a charge of illegal action on the part of a former President of the United States, makes this cause, as stated by the Court of Appeals, one in which not only the rights of the appellees and the Government of the United States are involved, but the interests of the public likewise. The fact that this suit is prosecuted under a special act of Congress by special counsel in that behalf appointed, as well as debates in Congress in relation thereto and the general publicity concerning the same in the press of the United States, emphasize the public importance of the cause and

make it the more necessary that no conclusion of the cause be reached except in full accord with the principles of law.

Moreover, the preservation of the rules of evidence is not mere matter of private concern but is matter of the highest public interest.

> "The settled rules of evidence which govern the trial of actions measure the extent and secure the protection of the rights of persons and property. Reversals, modifications, or variations of these rules produce instability and uncertainty in these rights, and breed distrust of courts and of governments."
>
> *Board of Comrs.* v. *Keene Five Cents Sav. Bank*, (C. C. A. 8) 108 Fed. 505, 510.

The attention of your Honorable Court is respectfully invited to the brief hereunto attached and herewith submitted in which there is set forth more in detail certain of the principal arguments in favor of your petitioners' contentions.

Wherefore, in view of the premises, petitioners and each of them pray that this Honorable Court will grant its Writ of Certiorari directed to the Circuit Court of Appeals for the Eighth Circuit, requiring that the record of said cause in the said court and its decree be certified to this Court, and that this Honorable Court will thereupon proceed to correct the errors complained of, reverse said decree and remand the said cause, and that this Honorable Court will give to your petitioners and each of them such other and further relief as the nature of the cause may

require and as to the Court may seem proper in the premises.

And your petitioners will ever pray.

Dated: November 3d, 1926.

MAMMOTH OIL COMPANY,

By JOHN W. LACEY,
MARTIN W. LITTLETON,
GEORGE P. HOOVER,
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SINCLAIR CRUDE OIL PURCHASING COMPANY and SINCLAIR PIPE LINE COMPANY,

By EDWARD H. CHANDLER,
RALPH W. GARRETT,
Their Solicitors.

We hereby certify that we have examined the foregoing petition and that in our opinion it is well founded and is one in which the prayer of your petitioners should be granted by this Court.

JOHN W. LACEY,
MARTIN W. LITTLETON,
EDWARD H. CHANDLER,

Of Counsel for Petitioners.

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BRIEF IN SUPPORT OF PETITION.

Opinions of the Courts Below.

The opinion of the District Court in this case will be found at page 225 of the Record and is reported in 5 Federal Reporter, 2nd, at page 330. The opinion of the Court of Appeals, not as yet officially reported, will be found at page 795 of the Record.

Statement of the Case.

The case is stated in the Petition (pp. 1-7) to which this brief is attached and will not be repeated here. As was shown in the Petition, both the District Court and the Court of Appeals found that there was no conflict in the evidence. The District Court held not only that there was no direct evidence of fraud in the procurement of the contracts, but that there was no evidence from which fraud could lawfully be inferred. The Court of Appeals, however, while likewise finding that there was no direct evidence of fraud, held that the charge of counsel for the United States "in their brief, that Mr. Sinclair received as dividends from the Continental Trading Company, Ltd., $230,500 face value of United States Liberty First 3½% Bonds, which he turned over to Secretary Fall in May, 1922, as a bribe", had been sustained. It based such conclusion solely upon inferences. We submit that such inferences were drawn

in violation of fundamental rules of evidence and that in this the Court of Appeals decided important questions of law in a way untenable and in conflict with the weight of authority. To this question we shall devote most of our discussion although we shall specify and briefly discuss other errors committed by the Court of Appeals.

Specifications of Error.

First. The Court of Appeals erred in finding that there was any evidence as a matter of law to establish fraud in the making of the lease of April 7, 1922 and the supplemental agreement of February 9, 1923.

Second. In arriving at the conclusion that there was evidence, as a matter of law, to establish fraud in the making of the lease and supplemental agreement, the Court of Appeals erred in disregarding fundamental rules of law in testing the evidence and in drawing unlawful inferences.

Further specifying error relating to the erroneous finding of fraud covered by Specifications of Error Nos. 1 and 2, the Court of Appeals erred in the following particulars:

(a) The Court of Appeals erred in inferring that Sinclair was a shareholder of or otherwise interested in the Continental Trading Company, Ltd., without any fact or circumstance proven from which such an inference could properly be drawn.

(b) The Court of Appeals erred in inferring that the Continental Trading Company, Ltd., paid any dividend or distributed any of its assets to its shareholders, either in Liberty Bonds or otherwise, in or

prior to May, 1922, without any fact or circumstance proven from which such an inference could properly be drawn.

(c) The Court of Appeals erred in drawing inferences of fraud against your petitioners from the failure to testify on the part of witnesses called by the United States and from the failure of petitioners to call Fall and Sinclair as witnesses.

(d) The Court of Appeals erred in inferring, upon the inferences above stated, that Sinclair as a shareholder of or otherwise interested in the Continental Trading Company, Limited, received dividends in Liberty Bonds, without any circumstances or fact proven from which such an inference could properly be drawn.

(e) The Court of Appeals erred in inferring, based upon the preceding inferences, that Sinclair received $230,500 in United States First Liberty Loan 3½% Bonds out of a total of $300,000 of such bonds, without any circumstances or fact upon which to rest such inference, and in the face of the repeated assertion by the court that Blackmer, O'Neil, Sinclair, Stewart and Osler were the persons interested in and shareholders of the Continental Trading Company.

(f) The Court of Appeals erred in inferring that the witness Everhart did not purchase Liberty Bonds shown to have been in his possession, solely because said witness Everhart claimed his constitutional privilege against self-incrimination, there being no fact or circumstance in the record upon which to base said inference, which rests solely upon the principal enunciated by the Court of Appeals that no honest man ever claims the constitutional privilege.

(g) The Court of Appeals erred in inferring, from an inference that because Everhart claimed his constitutional privilege, he could not have purchased said bonds and from the circumstance that some of these bonds were claimed to have been identified by their serial numbers as bonds which had been purchased by the Continental Trading Company, Limited, that Everhart must have received said bonds from Sinclair or the Continental Trading Company, Limited.

(h) The Court of Appeals erred in holding that said bonds were delivered to Everhart by Sinclair or the Continental Trading Company, Limited, as his agency, and that Everhart received these bonds for the purpose of delivering them to Fall as a bribe, without any fact or circumstance in the record upon which to rest such inference.

(i) The Court of Appeals erred in inferring that the said bonds were paid or delivered to Fall as a bribe, as a consideration for his granting or aiding in the grant of the lease upon Naval Petroleum Reserve No. 3.

(j) The Court of Appeals erred in inferring, because Sinclair, as the representative of the Mammoth Oil Company, had negotiated a lease in part with Secretary Fall for Naval Petroleum Reserve No. 3, that Sinclair was the person who paid the bribe to Fall through Everhart.

THIRD. The Court of Appeals erred in holding that certain books, records and other documentary evidence, stricken out by the District Court, were competent evidence to establish that certain Liberty Bonds were purchased by the Continental Trading Company and received by Fall or his son in law, Everhart.

FOURTH. The Court of Appeals erred in construing the Act of June 4, 1920, in holding that the discretion to determine whether it was necessary to take the oil from the ground was lodged with the Secretary of the Navy, and in holding that the Act was not mandatory but permissive, and in holding that the policy was not determined by Congress in the Act of June 4, 1920 but was left to the determination of the Secretary of the Navy.

FIFTH. The Court of Appeals erred in holding that your petitioner, Mammoth Oil Company, had no right in equity and good conscience to receive credit for the value of the things received by the Government from the Mammoth Oil Company under the lease and supplemental agreement.

SIXTH. The Court of Appeals erred in holding that the Sinclair Pipe Line Company and Sinclair Crude Oil Purchasing Company were trespassers *mala fides* on the Government lands as no fraud was alleged or proved as to either of them.

SEVENTH. The Court of Appeals erred in holding that the Sinclair Pipe Line Company and the Sinclair Crude Oil Purchasing Company should be enjoined and restrained from entering upon Naval Petroleum Reserve No. 3.

EIGHTH. The Court of Appeals erred in enjoining and restraining the Sinclair Pipe Line Company, a common carrier, from entering upon Naval Petroleum Reserve No. 3, without affording it the opportunity to procure from the Government authorities a right of way or easement to use

the surface of said lands or, failing to procure such authority, without affording it the right to remove from said land the property it had in good faith placed thereon.

NINTH. The Court of Appeals erred in enjoining and restraining Sinclair Crude Oil Purchasing Company from entering upon Naval Petroleum Reserve No. 3 without affording it the right to remove from said reserve the property it had in good faith purchased and constructed thereon.

ARGUMENT.

Specifications of Error Nos. 1 and 2.

In dealing with the question as to whether there was any evidence, as a matter of law, to establish fraud in the making of the lease, the Court of Appeals adopted the theory of the Government, as stated in the Government's brief in the Court of Appeals, and stated it as follows:

> "It is the theory of the Government, bluntly stated, that Secretary Fall received from Harry F. Sinclair, sole owner of appellee, Mammoth Oil Company, a pecuniary consideration which influenced him in granting to said Oil Company a lease of Naval Petroleum Reserve No. 3, commonly known as 'Teapot Dome'. Counsel for the United States charge in their brief that Mr. Sinclair received as dividends from the Continental Trading Company, Ltd., $230,500.00 face value of United States Liberty First 3½% Bonds, which he turned over to Secretary Fall in May, 1922, as a bribe. This charge is as grave and serious an accusation as could be made against a public official, augmented by the fact that the official so charged was in a sense trustee for the people of the United States of their public lands. *The case is one therefore in which not only the rights of the appellees and the Government of the United States are involved, but the interest of the public likewise*" (Italics ours). (R. p. 816.)

Again the Court of Appeals, speaking through Judge Kenyon, said on this subject:

> "The trial Court in its opinion refers to some of the circumstances in the case as suspicious, but finds

there are missing links in the testimony, which are supposedly the connection of Sinclair with the Continental Trading Company, Ltd., and with the acquisition of Liberty Bonds by Everhart, used for his and Secretary Fall's credit. *There is not sufficient direct evidence in this record to show these matters. The really determinative question therefore as to this branch of the case is: Are the reasonable inferences and presumptions legitimately and properly to be drawn from all the facts and circumstances disclosed in the evidence sufficient to supply the so-called missing link?*" (Italics ours.) (R. p. 838.)

It will be observed from these two excerpts taken from the opinion of the Court of Appeals that the finding that the evidence established fraud as a matter of law is predicated upon the proposition made in the Government's brief and adopted by the Court here, that Mr. Sinclair received as dividends from the Continental Trading Company $230,500, face value, of United States First 3½% Liberty Bonds, which he turned over to Secretary Fall in May, 1922, as a bribe. As to this, the Court of Appeals says: "There is not sufficient direct evidence in this record to show these matters" (R. p. 838). And it then proceeds to consider presumptions and inferences which it feels may be drawn from the facts proven to determine whether the alleged connection of Sinclair with the Continental Trading Company and with the delivery of the bonds to Everhart and Fall has been established. It must be borne in mind that the Record does not show through any witness or document or in any manner, that Sinclair ever was a stockholder in the Continental Trading Company, Ltd. The Record does not show that Sinclair ever received as a dividend any

Liberty Bonds from the Continental Trading Company, Limited, or that the Continental declared or paid any dividend prior to the time that certain Liberty Bonds were found in the possession of the witness Everhart. The Record does not show that Sinclair ever met or dealt with Everhart, or that he ever at any time delivered to Everhart or Fall any Liberty Bonds. The finding that Sinclair was a shareholder of the Continental Trading Company, Limited, and that he did receive Liberty Bonds as dividends, and that he turned these Liberty Bonds over to Everhart and Fall as a bribe, upon which the Court of Appeals predicates its finding of fraud, rests solely upon what the Court insists are inferences and presumptions which may be legitimately and properly drawn from all the facts. All of the evidence which bears upon the purchase of oil from Humphreys by Blackmer for the Continental Trading Company, Ltd., is stated in the petition. We insist that if an inference is to be drawn that Sinclair was a shareholder in the Continental Trading Company, Ltd., such an inference must be drawn solely from the testimony of Humphreys and Thomas with respect to the purchase of the oil by Blackmer from Humphreys and the resale thereof to the Prairie Oil & Gas Company and the Sinclair Crude Oil Purchasing Company, and may not be drawn from failure to testify on the part of witnesses called by the United States or from failure of petitioners to call witnesses to disprove such inference. Such an inference may not be drawn from other inferences. It must be drawn from evidence appearing in the record of facts or circumstances proved.

The only testimony in the Record from which any inference can be drawn respecting Sinclair's alleged connection

with the Continental Trading Company is the testimony of Senator Thomas, the testimony of Mr. Humphreys and the testimony of Mr. Osler. Senator Thomas testified:

> "I did know that the Prairie Oil and Gas Company was interested there in making another contract with Mr. Humphreys to take effect at the close of the first contract and that the Sinclair Crude Oil Company was represented jointly with the Prairie Oil and Gas in the purchase of that remaining oil. I assumed that from the presence of Mr. Sinclair. That purchase was accomplished right there. I do not know whether Mr. Sinclair or Mr. O'Neil had any other interest than that" (R. pp. 451-52).

Mr. Humphreys testified:

> "I had no knowledge who constituted or were interested in the Continental Trading Company other than Mr. Osler. I know there was another contract executed there the same day, and that one of the parties to that other contract aside from my companies was the Prairie Oil & Gas Company and the other party was the Sinclair Crude Oil Purchasing Company. Stewart and Sinclair represented the Sinclair Crude in making this contract and O'Neil represented the Prairie. I had no knowledge of any other purpose of their being there" (R. pp. 453-54).

Mr. Osler, referring to the meeting on November 17th in New York City testified:

> "I saw some at least of the persons named to me by my original client in the matter, whose name I am not at liberty to disclose" (R. p. 515).
>
> "If I saw Sinclair in New York he was a total stranger to me. I had never seen him before and

did not know him by sight. I don't think I know his name even and it made no impression upon me and I can't visualize him at the meeting with anybody I met in New York on that occasion. It is quite possible he was at one or more of these meetings and of course I don't know, but speaking from recollection it does not come into my mind at all. As to whether James O'Neil was present at these meetings in New York, I am not making any statement as to any other persons that I saw there. I must refuse to do that. I have merely made this statement as to Sinclair in order to clear up what otherwise might be a misunderstanding" (R., pp. 514-15).

It will be recalled that the testimony shows that Mr. Osler was the Barrister in Canada who organized the Continental Trading Company and acted for Mr. Blackmer in the transaction.

These three witnesses furnish all of the evidence, and the whole of the evidence, with respect to the alleged connection of Mr. Sinclair with the Continental Trading Company, Limited. We maintain that the evidence of Humphreys and Thomas clearly shows that Sinclair, as one of the representatives of the Sinclair Crude Oil Purchasing Company, which was one of the ultimate purchasers of the oil which was being sold, as well as the purchaser from Mr. Humphreys of his remaining oil had a legitimate reason for being present at the conference. In the face of this direct evidence that Sinclair had a reason for being present at the conference consistent with the highest integrity on his part, the Court of Appeals drew an inference that he was there for a fraudulent purpose.

The Court of Appeals, in dealing with this evidence and endeavoring to draw inferences from it, says:

> "While it is true that Blackmer carried on the preliminary and final negotiations for the purchase of the Humphreys oils the testimony of Thomas and of Humphreys shows that Blackmer was acting for other gentlemen as well as for himself. Under the contract entered into between the Continental Trading Company, Ltd., and the Humphreys Companies, the Continental Trading Company, Ltd., was quite sure to make a profit of approximately $8,000,000.00 if it kept the contract. This was surely not all for Blackmer. The other gentlemen sitting around the New York luncheon table, with the exception of Humphreys and Senator Thomas, were also engaged in this piece of high finance" (R. p. 840).

Further, the Court of Appeals says, speaking of Sinclair:

> "He was present with the other gentlemen when the Humphreys matters were discussed, and when the negotiations were concluded and contracts signed. Is it reasonable to suppose that the guaranty of the Humphreys contract made by Sinclair and Stewart acting for the Sinclair Crude Oil Purchasing Company would be made unless Sinclair had something to say as to the affairs of the Continental Trading Company, Ltd.? Would he participate in an arrangement by which the stockholders of the Company he represented would be mulcted to the extent of twenty-five cents per barrel of oil, unless he were participating in the profits thereof? Surely here is something laid at the door of Sinclair requiring explanation. It is no answer to say it relates to a matter not in this case. The Continental Trad-

> ing Company, Ltd., and its affairs occupy an important position in this case, not eliminated by the evasiveness of its President" (R. p. 841).

It will be observed from this quotation from the opinion of the Court of Appeals that the Court, in effect, bases its finding upon an inference that Sinclair's presence at this conference and his signing, together with Stewart, on behalf of Sinclair Crude Oil Purchasing Company, the guaranty of the performance of the contract between the Continental Trading Company and Humphreys, which is all that there is in the Record with respect to Sinclair's inferred connection with the Continental Trading Company, establishes that he was a stockholder in the Continental Trading Company, Limited. We maintain that this inference which the Court attempts to draw is illegitimate and wholly unwarranted. If the presence of Sinclair is reasonably accounted for by the fact that he was a representative of the Sinclair Crude Oil Purchasing Company, which was one of the ultimate purchasers of this oil from the Continental Trading Company, Ltd., as well as a purchaser of additional oil from Humphreys, then the reasonable inference and the only inference which the rules of evidence permit to be drawn is that he was present at and participated in the conference solely as such representative. Any other inference attempted to be drawn with respect to this does not rise to the dignity of an inference but is a pure speculation or conjecture. This is borne out by the extraordinary language of the Court of Appeals which, when speaking of the profit which the Continental Trading Company, Ltd., "was quite sure to make," says:

> "This was surely not all for Blackmer. The other gentlemen sitting around the New York luncheon

table, with the exception of Humphreys and Senator Thomas, were also engaged in this piece of high finance" (R. p. 840).

This is simply assertion, based upon speculation and conjecture. If we are to adopt the illegitimate and unwarranted inference of the Court of Appeals we do violence to all of the rules applicable to inferences and presumptions. We must infer that Sinclair and O'Neil and Stewart were engaged in a transaction which had for its object the cheating of the Companies which they represented. This is against the presumptions which obtain with respect to the dealings of men.

In a charge such as that made against Sinclair, he is presumed innocent and that presumption overrides all other presumptions until it is overthrown by evidence.

We inquire, what fact was certainly established with respect to this transaction upon which the Court of Appeals bases this inference that Sinclair was a stockholder in the Continental Trading Company? For the inference, to be allowable and defensible, must be an inference which is based upon a certain, proven fact or a circumstance which has been established. It is not permissible for the Court to infer a circumstance or to infer a fact. The fact must be in evidence and the inference must arise from it. In this particular the Court of Appeals has inferred a fact and a whole fact, on which it predicates an inference.

The Court of Appeals says:

> "Would he participate in an arrangement by which the stockholders of the Company he represented would be mulcted to the extent of twenty-five cents per barrel of oil, unless he were participating in the profits thereof?" (R. p. 841).

A more natural and more reasonable interrogatory,—one in accordance with the facts and the presumption on the facts is: Would he dare to participate in an arrangement by which the stockholders of the Company which he represented would be mulcted to the extent of twenty-five cents per barrel of oil?

The Court of Appeals presumes that Sinclair (and Stewart) could not have sat by, even though the Company which he represented was required to pay twenty-five cents more per barrel than had been agreed to be paid by Blackmer in the purchase from Humphreys, without practicing a fraud upon the Company which he represented. Again, we maintain that the presumption that men act honestly until the evidence and the facts show the contrary forbade the Court attempting to draw any such inference. There is nothing here in this connection to show that the Prairie Oil and Gas Company or the Sinclair Crude Oil Purchasing Company could have bought the oil directly from Humphreys at any price. On the contrary, the evidence shows that Blackmer, for a considerable period prior to the 14th day of November, had been negotiating with Humphreys for the purchase of this oil and on that day he concluded negotiations with Humphreys by himself. There is nothing to show that if the Sinclair Crude Oil Purchasing Company and the Prairie Oil and Gas Company wanted this amount of oil that they could have gotten it from any other source or for any less price than $1.75 per barrel; and therefore the statement of the Court of Appeals that these companies were mulcted to the extent of twenty-five cents a barrel is an assumption.

The Court of Appeals further says in this connection:

> "It is apparent, we think, that this Continental Trading Company, Ltd., was merely the agency of some of the gentlemen who sat around the luncheon table in New York negotiating for the purchase of the Humphreys oil, and was to do as a corporation what these gentlemen were evidently not willing to undertake as principals" (R. p. 841).

Is it fair to infer that because the Court of Appeals thought from one inference predicated upon another that the Continental Trading Company, Ltd., was "merely the agency" of some of the gentlemen who sat around the luncheon table negotiating for the purchase of the Humphreys oil, that Harry F. Sinclair was a stockholder in the Continental Trading Company, Ltd.? This is as strong as the Court seems able to express it.

How much more natural and reasonable is the inference which was drawn by the District Court in its opinion, where it says:

> "However, the testimony of Humphreys and Thomas clearly disclose that Osler and the Continental Trading Company were the creatures of Blackmer, which leaves us in the transaction with no other connection between Sinclair and Fall, except by mere suspicion or guess, and even this at a time considerably in advance of any established contact between them" (R. p. 258).

The Court of Appeals, commenting further upon the meeting of November 17th, said:

> "None other beside Sinclair in the company of men sitting around the table and arranging the

> Humphreys deal had any connection with Secretary Fall, either at that time or in the future, so far as the record shows. While this was prior to the signing of the lease, it is reasonably certain that negotiations were then either being carried on with reference thereto, or were in immediate prospect" (R. p. 845).

In this the Court of Appeals indulges in pure conjecture. There is not a syllable of evidence or an inference to be drawn from an established fact or circumstance that Sinclair had met Secretary Fall before December 31, 1921. Without any fact or circumstance on which to base it the Court of Appeals infers, or attempts to infer, that negotiations were in November, 1921, being carried on with reference to the lease of Teapot Dome or that negotiations were in immediate prospect. The Court infers that none other beside Sinclair present at the conference had any connection with Secretary Fall, either at that time or in the future, merely because the record does not show otherwise. This is an unjustifiable inference. The record quite naturally does not show whether or not Secretary Fall had any connection with any of the others present.

We have submitted the whole evidence relating to the purchase by the Continental Trading Company of the Humphreys oils, and we have called attention to the manner in which the Court of Appeals attempts to establish that Sinclair was a stockholder in the Continental Trading Company by inferring facts—by conjecture and by indulging in illegitimate presumptions. We maintain that the Record is destitute of evidence which would warrant a legitimate inference that Sinclair was a stockholder in the Continental Trading Company at any time or had any interest in it.

The Court of Appeals proceeds further with another class of inferences and presumptions. These inferences are drawn or attempted to be drawn from wholly unrelated incidents in the record. In order to bolster up the inferences upon inferences which the Court of Appeals has drawn with respect to the Continental Trading Company purchase of the Humphreys oil, the Court says:

> "The silence and evasions in this suit suggest many pertinent inquiries. Why should Osler refuse to disclose the connection, if any, of Sinclair with this Company? Why is silence the answer of a former Cabinet official to the charge of corruption? Why is silence the only reply of Sinclair, a man of large business affairs, to the charge of bribing an official of his Government? Why is the plea of self-incrimination,—one not resorted to by honest men,—the refuge of Fall's son-in-law Everhart? It would seem that men of standing in the business world when accused of being bribers would be quick to resent the charge and eager to furnish all information possible that might remove such stain upon their reputations. It is incredible that a former Cabinet official in the position of trustee of the public lands for the people of the United States, when accused of bribery and corruption in connection with his official duty in matters where great public interests are concerned, would not be quick to refute the same. Men with honest motives and purposes do not remain silent when their honor is assailed. It is amazing that officers of great oil companies, such as Blackmer and O'Neil, would flee their country and refuse to testify in a suit brought by their own Government to unearth an alleged fraud practiced on it by a high official. While Secretary Fall is not technically a party to this suit, he was the agent for the Government in

> the transactions provocative of this case, and his former principal is a party. Sinclair is in fact a party because the Mammoth Oil Company is his creation and agent. Its acts are his acts" (R. pp. 841, 842).

Is there anything in the Record to charge Sinclair or the Mammoth Oil Company with the refusal of Osler to testify? Is it a legitimate inference that because Osler claimed the privilege of an attorney that Sinclair was a stockholder or interested in the Continental Trading Company, Ltd.? Is an inference of this unrelated fact to be piled upon the other inferences which the Court of Appeals drew with reference to the Continental Trading Company's purchase of the Humphreys oils? For aught that appears upon the record, Osler's claim of privilege was upon justifiable grounds. He contested the matter in the courts of his own country, which courts, it will appear from their opinion, held that he was entirely within his rights and it was his duty to make the contest (R. p. 216). Does this circumstance respecting Osler in anywise logically or legitimately aid in an attempt to establish that Sinclair was a stockholder or otherwise interested in the Continental Trading Company?

Again, is the silence of a former Cabinet official, Secretary Fall, to the charge of corruption a fact or circumstance established in this Record from which a legitimate inference may be drawn that Sinclair was a stockholder or otherwise interested in the Continental Trading Company, Limited? Fall was not a party to the action. Is it not a more legitimate inference from Fall's silence under the charge of corruption in a case in which he was not a party, that he awaited the time he might be obliged to meet this

charge directly in case it was made against him? Why should the silence of Fall be charged up wholly to the defendant Mammoth Oil Company or to Sinclair and be used as a fact from which to draw an inference that Sinclair was a stockholder or otherwise interested in the Continental Trading Company, when Fall was equally available to the Government as a witness as to the petitioners?

The Court of Appeals says, "Why is silence the only reply of Sinclair, a man of large business affairs, to the charge of bribing an official of his Government?" Sinclair was not charged in the bill with bribery or with bribing an official of the Government. There was no evidence introduced nor any legitimate inference from evidence introduced or fact proven that Sinclair had bribed an official of the Government. The only charge that Sinclair had bribed an official of the Government will be found in the brief of Special Counsel for the Government referred to and adopted by the Court of Appeals in its opinion (R. p. 816).

We submit that the mere silence of Sinclair will not supply lacking affirmative proof against him or the Mammoth Oil Company, but that the rule is that it may be considered in weighing proofs already adduced tending to fix a liability on him in matters where complete and more exclusive knowledge of the facts concerning which he is silent is laid at his door. Is the silence of Sinclair under the circumstances a fact or circumstance from which the Court of Appeals is warranted in drawing the inference that Sinclair was a stockholder or otherwise interested in the Continental Trading Company? What fact or circumstance as to the organization of the Continental Trading Company—or as

to who were its stockholders—was laid at the door of Sinclair? Is it the rule that a mere charge against a party, wholly unsupported by proof, is something laid at his door for him to disprove or be found guilty?

The Court of Appeals says: "Why is the plea of self-incrimination—one not resorted to by honest men—the refuge of Fall's son-in-law, Everhart?" (R. p. 842). From the fact that Everhart claimed his constitutional privilege, which the Court of Appeals does not go so far as to challenge, the inference is attempted to be drawn that in some way this tends to prove that Sinclair was a stockholder in the Continental Trading Company or otherwise interested in it. The rule is universal that the assertion of a privilege by a witness which relieves him from testifying cannot be charged to either party to the action. Is it the rule that the constitutional privilege against self-incrimination is only resorted to by dishonest men?

The Court further says:

> "It is amazing that officers of great oil companies, such as Blackmer and O'Neil, would flee their country and refuse to testify in a suit brought by their own Government to unearth an alleged fraud practiced on it by a high official" (R. p. 842).

And from this in the connection in which it is used, apparently the Court of Appeals attempts to draw the inference that this circumstance in some way tends to prove that Sinclair was a stockholder or otherwise interested in the Continental Trading Company, Ltd. The Government propounded interrogatories to Blackmer and O'Neil, who declined to testify. Surely the refusal of Blackmer and O'Neil to testify in response to interrogatories of the Gov-

ernment is not a fact from which an inference can be drawn that Sinclair was a stockholder or otherwise interested in the Continental Trading Company, and is in no wise chargeable to the Mammoth Oil Company. There is nothing in the record to show that the Mammoth Oil Company or Sinclair was in anywise responsible for the refusal of these witnesses to testify, nor that they were any more available as witnesses for the Mammoth Oil Company than for the Government.

The rule applicable to the drawing of inferences from proven facts or circumstances was clearly disregarded by the Court of Appeals, as evidenced by its declaration that:

> "These gentlemen have the right to remain silent, to evade, to refuse to furnish information and thus to defy the Government to prove its case; but a court of equity has the right to draw reasonable and proper inferences from all the circumstances in the case, and especially from the silence of Secretary Fall and from the failure of Sinclair to testify" (R. p. 842).

Again the Court of Appeals disregarded the law applicable to the drawing of inferences from proven facts or circumstances by declaring:

> "From all the circumstances, especially in view of his failure to testify and explain the formation of this corporation or to deny his connection therewith, the reasonable inference is that Sinclair was one of the principals and shared in the profits of this transaction" (R. p. 845).

The Court of Appeals having drawn these inferences, which we maintain were, in the light of settled and funda-

mental principles, unlawful inferences, finally arrives at the conclusion that Sinclair was one of the principals in the Continental Trading Company and shared in the profits resulting to the Continental Trading Company from the purchase and resale of the Humphreys oils.

The Court of Appeals finally reached the result in its opinion that Sinclair was a shareholder in the Continental Trading Company, Limited. It reached this result solely from inferences upon inferences and from unrelated circumstances and in the face of established presumptions of law.

The Court of Appeals having inferred that Sinclair was a shareholder in the Continental Trading Company, Limited, proceeds to build upon this inference the whole structure of inferences upon which its opinion rests.

From the inference that he was a shareholder in the Continental Trading Company, Limited, the Court of Appeals infers that he received a dividend paid in Liberty Bonds.

The Court then proceeds, basing its opinion on what it characterizes as the evasions of Osler, and says:

> "In view of this testimony, evasive and noncommittal as it is, taken in connection with the statement in Osler's letter of August 9, 1923, to the Under Secretary of State at Ottawa, Ontario, that the Continental Trading Company, Ltd., had 'divided its assets ratably amongst its shareholders,' it is fair to assume that the warrant shareholders received dividends and assets in the form of Government bonds, as the bonds purchased constituted the only assets of the Company shown by the record" (R. p. 846).

This inference that the shareholders received the bonds as dividends is drawn from the circumstance that Osler had stated in his letter of August 9, 1923, to the Under Secretary of State at Ottawa that the Continental Trading Company, Ltd., had "divided its assets ratably amongst its shareholders." The Court ignores the fact that this letter of Osler to the Under Secretary of State at Ottawa was dated August 9, 1923, more than a year after certain bonds were found in the accounts of Everhart and Fall.

Resting upon a succession of double inferences, the Court of Appeals proceeds with the statement:

> "We then have a situation where an agency of Sinclair and others, the Continental Trading Company, Ltd., had as a part of its assets some of the very Liberty Bonds which soon after their acquisition by said agency appeared in the hands of Fall's son-in-law, and were deposited to Fall's credit in banks and used to liquidate his debts. There is no direct evidence to show how the bonds of the Continental Trading Company, Ltd., came into Everhart's possession" (R. p. 845).

The Court of Appeals here draws the further inference, based upon what might be called the fundamental inference, that the Continental Trading Company, Ltd., was an agency of Sinclair and others, because the Court has already inferred that Sinclair was a stockholder in the Continental Trading Company, Ltd., or otherwise interested in it. There is no evidence in the Record and no circumstance in the Record indicating that the Continental Trading Company, Ltd., was at any time or in any manner an agency of Sinclair's.

The Court of Appeals said, "There is no direct evidence to show how the bonds of the Continental Trading Company, Ltd., came into Everhart's possession" (R. p. 845). The truth is that the Record shows that there is neither direct, circumstantial nor any kind of evidence showing how the bonds came into the possession of Everhart.

Because Everhart, as the Court of Appeals phrases it, took refuge in a plea of self-incrimination, the Court again resting an inference upon an inference, which in turn rests upon another inference, finds:

> "* * *, the fact is sufficiently established that the bonds in the possession of Everhart and used in part for Secretary Fall's benefit were received by Everhart either from Sinclair or the Continental Trading Company, Ltd." (R. p. 846).

The Court then further finds that

> "That Company" (the Continental Trading Company, Ltd.) "we have pointed out, is shown to have been the agent of Sinclair, Blackmer, O'Neil and Stewart. Its assets consisted principally of Liberty Bonds. These assets were delivered to the shareholders, as Osler's letter shows" (R. p. 846).

No foundation for this statement can be found anywhere except in the succession of double inferences in which the Court has indulged to reach this conclusion. Again it must be pointed out that there is no evidence that the Continental Trading Company, Ltd., was in any sense or at any time or in any way the agent of Sinclair, or that he was a shareholder in it or otherwise interested in it. The evidence shows the Continental Trading Company, Ltd.,

continued in active business until June 1, 1923, and there is no evidence that any of its profits were distributed in dividends prior to that time. There is no evidence that its assets were delivered to its shareholders except the reference to the letter of August 9, 1923, more than a year after the bonds which are alleged to have been delivered as a bribe were found in the possession of Everhart and used for the benefit of Fall. There is no evidence that the assets which were distributed upon dissolution consisted of Liberty Bonds. The mere fact that the letter of August 9, 1923 stated that the assets of the Continental Trading Company had been "divided ratably among its shareholders" certainly affords no evidence that such division was in Liberty Bonds, nor does it afford any double inference that Sinclair was a stockholder and received any Liberty Bonds.

Thus far the Court of Appeals inferred Sinclair was a stockholder in the Continental Trading Company, Ltd., without any evidence, direct or circumstantial, on which to base such an inference. The Court of Appeals further inferred, resting upon the above primary inference, that the Continental Trading Company became in some way an agency of Sinclair's without any evidence, circumstantial or otherwise, on which to base such an inference. The Court of Appeals further infers, resting one inference upon another, that the Continental Trading Company, Ltd., distributed its assets, consisting of Liberty Bonds, to its shareholders and that Sinclair was one of the shareholders. In order to fasten the responsibility for the delivery of the bonds to Everhart upon Sinclair or his agency, the Court infers without any fact or circumstance upon which to rest the

inference, that the Liberty Bonds received by Everhart were received by him either from Sinclair or the Continental Trading Company, Ltd. There is not a scintilla of evidence from which an inference could be drawn to justify this finding of the Court. The Court arrives at this result by a succession of double inferences, starting with the primary inference that Sinclair was a stockholder in the Continental Trading Company, Ltd. These double inferences are drawn for the purpose of sustaining the conclusion of the Court that Sinclair, either directly or through an agency, to-wit, the Continental Trading Company, Ltd., through Everhart, Fall's son-in-law, delivered a bribe to Fall as a consideration for the granting of the lease of Teapot Dome. It will be recalled that the Court adopted the theory of the Government at the outset of the discussion of the subject of fraud, saying:

> "It is the theory of the Government, bluntly stated, that Secretary Fall received from Harry F. Sinclair, sole owner of appellee, Mammoth Oil Company, a pecuniary consideration which influenced him in granting to said Oil Company a lease of Naval Petroleum Reserve No. 3, commonly known as 'Teapot Dome'. Counsel for the United States charge in their brief that Mr. Sinclair received as dividends from the Continental Trading Company, Ltd., $230,500.00 face value of United States Liberty First 3½% Bonds, which he turned over to Secretary Fall in May, 1922, as a bribe" (R. p. 816).

Having adopted this from the Government's brief as a necessary and fundamental fact on which to rest the finding of fraud, justifying a cancellation of the lease, the Court of Appeals, starting with an inference not drawn from any

circumstance or fact in the case, that Sinclair was a shareholder in the Continental Trading Company, Ltd., bases upon that first inference a further inference that he received Liberty Bonds as a dividend from the Continental Trading Company, Ltd., and because Everhart claimed his constitutional privilege draws the further inference that he, Everhart, did not purchase the bonds and must have obtained them in some way other than by purchase, and because theretofore Sinclair had been negotiating for a lease on Naval Reserve No. 3 with Secretary Fall,—a lease which has been shown to be favorable to the Government and onerous to the lessee,—the Court infers that the lease was granted by Fall in consideration of a bribe to be paid to Fall by Sinclair; it infers that the bonds in Everhart's possession and subsequently in Fall's account were a bribe without any fact or circumstance upon which to rest the inference, and finally infers without any fact or circumstance upon which to rest the inference but by resting one inference upon another inference, that Sinclair himself or the Continental Trading Company, Ltd., as his agent, delivered these bonds in question to Everhart to accomplish the bribery of Fall. The language the Court of Appeals uses in this connection is:

> "The reasonable, proper and natural inferences and presumptions from the accrual of condemnatory incidents appearing in this record supply the so-called missing links in the testimony and satisfy us of Sinclair's connection with the Continental Trading Company, Ltd., and with the acquisition of the Government Liberty Bonds by Everhart and Secretary Fall" (R. p. 847).

And finally concludes:

> "Our conclusion is that the Government has sustained its claim that the lease and contract were procured by fraud and corruption, and that they should be cancelled" (R. p. 847).

We maintain that the inferences and presumptions to which the Court refers as the basis of its final conclusions are not reasonable, proper or natural and violate fundamental rules of law which we shall presently consider. It is incontestible that this conclusion rests upon a succession of double inferences, drawn from no fact or circumstance established in the evidence, and in part from inferences and presumptions drawn from wholly and totally unrelated incidents with which the Mammoth Oil Company or Sinclair are not shown to have had even the remotest connection.

Let us enumerate the inferences on which this final conclusion of the Court of Appeals solely rests:

> (a) It is inferred that Sinclair was a shareholder in the Continental Trading Company, Ltd., or otherwise interested in it without any fact or circumstance proven from which such an inference could properly be drawn. Upon this first inference, it is further inferred
>
> (b) It is inferred that the Continental Trading Company, Ltd., paid a dividend in or prior to May, 1922, and that it paid such dividend in Liberty Bonds, without any fact or circumstance proven from which an inference could properly be drawn that it paid a dividend either in Liberty Bonds or otherwise.

(c) That Sinclair received as a shareholder in the Continental Trading Company, Ltd., dividends in Liberty Bonds, without any circumstance or fact proven from which such an inference could properly be drawn. Upon this third inference it further infers, without any circumstance or fact upon which to rest the inference,

(d) That Sinclair received $230,500 in United States First Liberty Loan 3½ Per Cent. Bonds, out of a total of $300,000 of such bonds, in the face of the repeated assertion by the Court that Blackmer, O'Neil, Sinclair, Stewart and Osler were the persons interested in and shareholders of the Continental Trading Company, Limited.

These inferences, pyramided one upon another, are the inferences which the Court of Appeals draws without proven facts or circumstances to establish Sinclair's interest in the Continental Trading Company, Limited, and his connection with or receipt of Liberty Bonds as dividends.

The Court of Appeals then turns to that portion of the Record which deals with the affairs of Everhart and Fall in New Mexico and Colorado. The first inference which the Court draws with respect to the facts concerning Everhart and Fall is

(e) That Everhart did not purchase these bonds and did not come into the possession of them honestly, because he claimed his constitutional privilege against self-incrimination. This inference has no fact or circumstance in the Record upon which to rest but rests solely upon the principle enunciated by the Court of

Appeals that no honest man ever claims the constitutional privilege.

(f) The Court of Appeals further infers that, as Everhart claimed his constitutional privilege and could not have purchased the bonds, and that as these bonds or a large part of them were claimed to have been identified by their serial numbers as bonds which had been purchased by the Continental Trading Company, Ltd., through the branch of the Dominion Bank of Canada in New York, Everhart must have received the bonds from Sinclair or the Continental Trading Company, Limited, as his agents. It will be observed that this inference not only rests upon another inference that Everhart could not have purchased the bonds, but also rests upon this series of inferences heretofore referred to:

(1) That Sinclair was a shareholder in the Continental Trading Company, Limited;

(2) That he received dividends in bonds from the Continental Trading Company, Limited; and

(3) That as early as May, 1922 he received $230,500 of bonds out of a total of $300,000 purchased by the Continental Trading Co., Limited, prior to that date.

Resting upon this succession of double inferences, the Court further infers,

(g) That these bonds were delivered to Everhart by Sinclair or the Continental Trading Company, Ltd., as his agency, and that Everhart received these bonds for the purpose of delivering them to Fall as a

bribe, without any fact or circumstance in the Record upon which to rest such an inference.

The Court of Appeals further infers, without any fact or circumstance upon which to rest the inference.

(h) That this bribe was paid to Fall as a consideration for his granting or aiding in the grant of the lease upon Naval Petroleum Reserve No. 3.

The Court of Appeals further infers, resting upon a bewildering succession of double inferences, that as Sinclair had negotiated the lease in part with Secretary Fall for the Naval Petroleum Reserve No. 3, that he was the only one of those present at the execution of the contract between Continental Trading Company, Ltd., and Humphreys who could have had any motive to bribe Fall and that therefore he was the person who paid the bribe through Everhart to Fall.

It will be observed that the Court of Appeals ordered the cancellation of this lease because of the bribery of Fall by Sinclair and the consequent perpetration of a fraud upon the Government. The finding of bribery and fraud, we maintain, is without any evidence in the Record to support it. The result arrived at by the Court of Appeals rests on inferences, which in turn rest upon other inferences, none of which can legitimately be drawn from any established fact or circumstance in the case.

The presumptions indulged in by the Court violate the principles of law applicable to presumptions.

A final and complete analysis of the opinion of the Court of Appeals leaves us with nothing but questions of law to consider.

Principles of Law Involved.

Proof of Fraud Must Be Clear, Unequivocal and Convincing—Fraud Cannot Be Presumed.

The rule in the Federal courts has long been well-settled that fraud is not to be presumed; that it is not to be presumed from any number of lawful acts; that where an act and circumstance are as consistent with an honest motive as with a dishonest one, the former must be preferred; that fraud cannot be proved by a bare preponderance of the evidence, but only by evidence that is clear, unequivocal and convincing.

Conard v. *Nicoll*, 4 Pet. 291;
U. S. v. *Arredondo*, 6 Pet. 691;
Clarke v. *White*, 12 Peters, 178, 196;
Kessler & Co. v. *Ensley Co.*, 141 Fed. 130, 137;
Jones v. *Simpson*, 116 U. S. 609, 615;
United States v. *Maxwell Land Grant Company*, 121 U. S. 325, 381;
United States v. *Hancock*, 133 U. S. 193, 197;
Foster v. *McAlester* (C. C. A. 8), 114 Fed. 145, 152;
The Atlantic Delaine Company v. *James*, 94 U. S. 207;
United States v. *Des Moines Navigation & Railway Company*, 142 U. S. 510;
U. S. v. *Budd*, 144 U. S. 154;
U. S. v. *American Bell Telephone Company*, 167 U. S. 224;
United States v. *Stinson*, 197 U. S. 200;

United States v. *Clark*, 200 U. S. 601;
Mastin v. *Noble* (C. C. A. 8), 157 Fed. 506;
Wilson v. *Sands* (C. C. A. 8), 231 Fed. 921;
Folk v. *United States* (C. C. A. 8), 233 Fed. 177;
U. S. v. *King* (C. C. A. 9), 83 Fed. 188;
United States v. *Wildcat*, 244 U. S. 111.

There are certain well-settled rules of law that guide the courts in the determination of this question. If the circumstances proven are just as consistent with honesty and good faith as with fraudulent intent, the inference of fraud is unwarranted. Fraud cannot be established by circumstantial evidence unless it is the only conclusion that can fairly and reasonably be drawn.

U. S. Fid. & Guar. Co. v. *Des Moines Nat. Bank*, 145 Fed. 273; 74 C. C. A. 553.

Proofs which only create a suspicion are not sufficient to warrant a finding of fraud. *U. S.* v. *Hancock*, 133 U. S.; 10 Sup. Ct. 264; 33 L. Ed. 601.

A mere preponderance of evidence which at the same time is vague or ambiguous is not sufficient to warrant a finding of fraud. *Lalone* v. *United States*, 164 U. S. 255; 17 Sup. Ct. 74; 41 L. Ed. 425.

In a civil action, where fraud and bribery are charged, the presumption of innocence applies with the same force and effect as it does in a criminal case, and that presumption of innocence outweighs all other presumptions and inferences until it is overcome by clear and convincing evidence. *Jones Law of Evidence* (2d ed.), 1908, Sec. 13.

The Rules as to Inferences.

No inference of fact or of law is reliably drawn from premises which are uncertain; nor can legitimate inferences be drawn from other inferences nor presumptions indulged which rest upon the basis of another presumption. The law requires an open, visible connection between the principal fundamental facts and the deductions from them and does not permit decisions to be made on remote inferences. A presumption is not a circumstance in proof and it cannot therefore be made the legitimate foundation for another presumption. There is no open and visible connection between the fact out of which the first presumption arises and the fact which is sought to be established by the dependent presumption.

U. S. v. *Ross*, 92 U. S. 281; 23 L. Ed. 707;
Manning v. *Insurance Co.*, 100 U. S. 693; 25 L. Ed.
Looney v. *Metropolitan Street Ry. Co.*, 200 U. S. 480; 26 Sup. Ct. 303; 50 L. Ed. 564;
U. S. Fidelity & Guaranty Co. v. *Des Moines Natl. Bank*, 145 Fed. 273; 74 C. C. A. 553;
Vernon v. *United States*, 146 Fed. 121, 125;
Postal Telegraph-Cable Co. v. *Livermore & Knight Co.*, 188 Fed. 696, 699;
Cunard Steamship Co. v. *Kelley*, 126 Fed. 610, 615;
Davis v. *United States*, 18 App. (D. C.), 468, 495.

The Court of Appeals in effect drew inferences adverse to the Mammoth Oil Company because of the declination of

Blackmer and O'Neil to testify, and the failure of petitioners to call Fall as a witness, and because Osler and Everhart asserted their respective privileges. These circumstances were used by the Court of Appeals in reaching the conclusion of fraud against the petitioner, Mammoth Oil Company, and as a source of unrelated inferences. The rule is: No unfavorable presumption arises from the failure to produce evidence if it is not within the control of the one who fails to produce it, nor from the failure to call as a witness one whom the other party had the same opportunity of calling, nor if the testimony not given is privileged.

Jones Law of Evidence (Ed. 2, 1908), Sec. 21;
State v. *Buckman*, 74 Vt. 309; 52 Atl. 427;
Cross v. *Lake Shore Ry.*, 69 Mich. 363;
First National Bank v. *Hyland*, 6 N. Y. S. 87; 53 Hun 108.
Erie R. R. v. *Kane*, 118 Fed. 223, 238.
Scovill v. *Baldwin*, 27 Conn. 316;
Bleeker v. *Johnston*, 69 New York 309-313;
Arbuckle v. *Templeton*, 65 Vt. 205;
Crawford v. *State*, 112 Ala. 1;

Improper Inferences Drawn From Failure of Mr. Sinclair to Testify.

The Court of Appeals, speaking through Judge Kenyon, said:

> "Of course, a plaintiff in a case cannot insist that the defendant must furnish evidence he may have or permit plaintiff to succeed, and there must be affirmative proof of facts prima facie at least

to sustain plaintiff's contentions, before inferences can be properly drawn. The language used by some courts is that there must be something laid at defendant's door. As before indicated, we are of the opinion that that situation existed here" (R. p. 844).

Again the Court said:

> "With important and controlling facts in Sinclair's possession, and with a train of circumstances that aroused the gravest suspicion as to corruption practiced in securing the lease laid at his door, his failure to testify is a matter of deep significance. There is a presumption in the law that if a litigant have facts within his knowledge and refuses to reveal them, it is presumed that if revealed they would be against him. The silence of one who should speak may well create an inference adverse to him" (R. p. 843).

We submit that the true principle is that the mere silence of a party will not supply lacking affirmative proof against him, but may be considered in weighing proofs already adduced tending to fix a liability upon him in matters where complete and more or less exclusive knowledge of the facts concerning which he is silent is laid at his door. Where there is a total lack of evidence tending to show guilt, mere silence of the party proceeded against cannot be the basis of a presumption of guilt. *W. F. Corbin Co.* v. *United States*, (C. C. A. 6) 181 Fed. 296.

> *Owens Bottle Mach. Co.* v. *Kanawha Banking & Trust Co.* (C. C. A. 4) 259 Fed. 838; 842;
> *Omar Oil & Gas Co.* v. *Bair Oil Co.*, 285 Fed. 588;
> *Stimpson* v. *Hunter*, 234 Mass. 61;

Shotwell v. *Dixon*, 136 N. Y. 43;
Loper v. *Askin*, 178 App. Div. (N. Y.), 163, 164;
Texas & Pacific Ry. Co. v. *Shoemaker*, 98 Texas 451;
Blackman v. *Andrews*, 150 Mich. 322, 114 N. W. 218;
Chicago Mill & Lumber Co. v. *Cooper*, 90 Ark. 326; 119 S. W. 672;
Thompson v. *Daviltte*, 59 Ga. 472;
Lowe v. *Massey*, 62 Ill. 47;
City of New Orleans v. *Gauthreaux*, 32 La. Ann. 1126.

Specification of Error No. 3.

We submit that the Court of Appeals erred in holding that certain entries and records of banks and brokers and other private persons entire strangers to the cause, made in the the absence of your petitioners or any of them or any of their representatives, to which none of your petitioners nor anyone representing any of them were parties, set forth at pages 18, 19 and 20 of the petition, were competent evidence against your petitioners.

The District Court considered the case as though all this evidence were competent and found for your petitioners with that evidence in the scale, but passing upon the objection formally in its opinion and for the purpose of making the record, said:

> "The motion has as its basis two grounds, first, that all of this evidence is inadmissible because falling within the rule that such records are *res inter alios acta*; and second, that much of this evidence

was objectionable for the reason that it was additionally of a hearsay character because the parties who purported to testify to it had no personal knowledge of the books, and records themselves. The court considered this question upon the trial and made a tentative ruling, citing some authorities expressing views upon the subject. While the first question has not been passed upon in late years in our Circuit, the case of Board of Commissioners v. Keene, 108 Fed. 365, seems to recognize the doctrine contended for by defendants and therefore for the purpose of making the record so that the Appellate Court may pass upon it if it may be so advised, the motion to strike will be sustained upon this first ground" (R. p. 279).

The Court of Appeals considered and weighed these records and entries as competent evidence of facts and circumstances from which it drew its inference of fraud. Speaking through Judge Kenyon, the Court said:

> "The Court based its action in sustaining the motion to strike on the ground that the rule '*res inter alios acta*' applied to and governed the situation. The ruling would seem to be entirely unimportant, for the reason that if this evidence, conceding it to be admissible in connection with the other evidence in the case, was insufficient to sustain the charge of fraud, then the question of whether it was properly admitted, was of no consequence. If, however, the transactions as to the purchase of the Government Liberty bonds was a part of or resulted from a conspiracy between Fall and Sinclair to corruptly bring about the execution of the lease they were and matters between strangers and the evidence relating

thereto would not be subject to the rule of '*res inter alios acta*' " (R. p. 849).

With due respect to the Court of Appeals, we submit that it seems to have failed to understand the character of the objection made. The entries in these books were written down by strangers to this record in transactions to which the parties here are strangers. The books and records were *res inter alios acta*. Written hearsay is not more competent than spoken hearsay.

Board of Commissioners v. *Keene Five Cent Savings Bank* (C. C. A. 8), 108 Fed. 505, 510;

Union Pacific Ry. Co. v. *Perrine* (C. C. A. 8), 267 Fed. 657, 659;

Crowell Bros. v. *Panhandle Grain & Elevator Co.* (C. C. A. 8), 271 Fed. 129, 135;

Kerbaugh v. *Gray* (C. C. A. 2), 212 Fed. 716;

Minton v. *Underwood Lumber Co.*, 79 Wis. 646, 648;

Barnes v. *Simmons*, 27 Ill. 511, 512.

Specification of Error No. 4.

In connection with the question as to whether the Court of Appeals construed the Act of June 4, 1920 correctly in holding that the discretion to determine whether it was necessary to take the oil from the ground was lodged with the Secretary of the Navy, instead of holding that the Congress by the terms of the Act determined that he must take the oil from the ground in order to conserve it, the Court of Appeals, speaking through Judge Kenyon, said:

"Counsel for appellees argue that the language of this Act compels the Secretary of the Navy to employ all of the methods suggested, and that the term 'in his discretion' applies to the method by which he shall 'conserve, develop, use and operate.' We do not agree with this view. It is apparent that, although the conjunction 'and' is used, *Congress intended that the Secretary should employ any or all of these methods as his discretion should dictate. Certainly if the oil can be properly conserved in the ground the Secretary of the Navy is not under compulsion to develop the properties. What he does must be for the benefit of the United States. That is the limitation of his discretion. If he shall determine that the oil cannot be properly conserved within the ground, then he has the right to develop, use and operate the properties directly or by contract, lease or otherwise. Having decided in the exercise of a wise discretion that it is for the interest of the Navy, and therefore of the United States, to develop and operate the properties, he may do this directly, which will require the expenditure of money, or he may do it by contract or by lease*" (Italics ours). (R. p. 812).

Our contention was and is that the Act of June 4, 1920, speaks for itself upon this question. It provides "that the Secretary of the Navy is *directed* to take possession of *all* properties within the Naval Petroleum Reserves * * *; to conserve, develop, use and operate *the same*"; that is to say, "*all* properties" (Italics supplied). The word used by the statute is not "authorized". It is not a merely permissive word. It is the imperative word "directed". It is a *command*. Moreover the command is to "conserve, develop, use *and* operate." It is not in the disjunctive.

The Secretary of the Navy is to do all four of these things with no thought that he is to do one or another of them. The words "develop, use and operate" mean the same thing. That is, to drill wells to the oil and proceed to extract the oil. The word "conserve" means to preserve from loss, to defend from violation, to preserve from waste. Coupled in the conjunctive with the other words of the statute, as it is, under the doctrine of *noscitur a sociis*, it means in this statute to preserve from loss by developing, using and operating. The four words contain a single thought and this not permissive but commanded. That single thought is expressed in all the ways it could have been expressed and is coupled with the word "directed".

Specification of Error No. 5.

Under the decree of the Court of Appeals, the Mammoth Oil Company is required to account for all oil removed from Naval Petroleum Reserve No. 3 without credit for the value of the things received by the United States under the contracts, to wit, storage facilities constructed at Portsmouth, New Hampshire, at a cost in excess of $1,000,000 (R. p. 717). We submit that such credit should be allowed under the rule that he who seeks equity must do equity and he who would rescind a contract for any cause may not at the same time retain fruits of the contract without compensation.

Neblett v. *Macfarland*, 92 U. S. 101;
Stoffela v. *Nugent*, 217 U. S. 499;
Story Eq. Jur. 14 Ed., Sec. 957.

Specifications of Error Nos. 6, 7, 8, 9.

The Court of Appeals, disposing of the question affecting the Sinclair Pipe Line Company and the Sinclair Crude Oil Purchasing Company, said:

> "As our conclusion is that the lease and contract were procured through fraud and corruption, each of the appellees is a mala fide trespasser on the Government lands, and therefore no credit for expenditures can be allowed any of them by the Court" (R. p. 851).

As to Sinclair Pipe Line Company.

It will be noted from the brief statement set forth in the petition for certiorari submitted herewith, that the Court of Appeals decided that the pipe line company is a *mala fide* trespasser on Government land and the basis for this conclusion appears to be one of two alternatives; first: that H. F. Sinclair is or was Chairman of the Board of Directors of Sinclair Consolidated Oil Corporation and *probably* its largest stockholder and that Sinclair Consolidated Oil Corporation owns one-half of the capital stock of Sinclair Pipe Line Company, or, second: that because the Court finds that the lease contract of April 7, 1922, was procured for Mammoth Oil Company by Mr. Sinclair through fraud, that such finding renders such lease contract void *ab initio* and no third person or corporation could obtain any rights or equities therein or flowing therefrom even though they acquired such rights without notice and expended money in good faith relying upon the validity of such lease contract.

With reference to the first proposition—it is not contended or in any way shown by the record that Mr. Sinclair was in any way in control of Sinclair Pipe Line Company, other than he was the chief executive officer of a corporation owning one-half of the capital stock of such pipe line company; we realize that knowledge of an officer of a corporation is often imputed to the corporation of which he is an officer, but that knowledge of a fraud committed by a stockholder of a corporation, owning only one-half of the stock of another corporation, is to be imputed to such other corporation, is an entirely different proposition.

Upon the second proposition the Court of Appeals found that the contract of assignment and nomination which was executed on behalf of the United States by the Secretary of the Interior and the Secretary of the Navy in December, 1922, was executed prior to any attempt on behalf of the Government to rescind the lease contract of April 7, 1922 (R. p. 850). It is the general rule that fraud does not render the contract void *ab initio* but only voidable, and that it is valid until rescinded, or an attempt is made to rescind it by the party alleging the fraud; it is clear that any rights or equities in favor of the pipe line company accrued to it while such contract was in full force and effect and before any attempt had been made to rescind it by the Government, and that the pipe line company constructed its pump station and pipe line upon the Reserve in reliance upon its rights so to do under its contract of December, 1922; there was no evidence offered and no contention made by the representatives of the Government, that such contract of December, 1922, was procured by the pipe line company as the result of any fraud or misrepresentation practiced upon the

Cabinet Officers representing the Government in the execution thereof.

The Court of Appeals apparently overlooked the fact that this company was not asking or seeking any accounting for the value or cost of its pump station and main pipe line placed by it upon the Naval Reserve, but was only asserting that by virtue of the facts and the contract of December, 1922, it was entitled to maintain its property and pump station upon the Naval Reserve. It was shown that the pipe line company had expended in excess of $700,000 in constructing its pump station, equipment connected and operated therewith and the portion of its main pipe line system across and upon the Reserve (R. 739), and that such pump station and line was a part of its main line system and used for the transportation of oil as a common carrier in Interstate Commerce, and therefore subject to the jurisdiction and control of the Interstate Commerce Commission by virtue of the laws of the United States governing common carrier pipe lines.

It is our contention that the Court of Appeals, even though it found that the lease contract of April 7, 1922, was voidable on account of fraud and corruption in securing the execution of the same, nevertheless the facts herein set forth with reference to the pipe line company do not render it a trespasser *mala fide;* that in fact it was not a trespasser in any respect but was entitled to remain in possession of the surface used by it for its pump station and pipe line system by reason of the fact that it was accepted by the United States, acting by the Secretary of the Navy and the Secretary of the Interior, as the assignee of the Mammoth Oil Company of the right of way or ease-

ment theretofore granted Mammoth Oil Company; and that such acceptance by the United States of this company as such assignee, there being no contention that such acceptance was procured by any fraud or corruption, constituted a new and independent grant of an easement or right of way to Sinclair Pipe Line Company independent of Mammoth Oil Company.

Even though we be in error in the foregoing contention, we maintain that under the peculiar facts and circumstances of this case, even though it be held that the pipe line company is a trespasser because in possession of Government land without proper authority to occupy the surface thereof, the injunction granted by a Court of Equity to stop further trespass and retention of possession should be in the alternative, and not become finally effective until a reasonable time has been given the common carrier to procure from the proper Governmental authorities a right of way or easement to use such surface upon proper payment therefor, or, failing so to do, that it be required to remove from the Government land the property it has in good faith placed thereon believing it had a legal right to do so.

This Court has had occasion to consider a somewhat similar contention and in the case of *Utah Power & Light Company* v. *United States*, 243 U. S. 389, 61 L. Ed. 791, at page 403, stated the object of a suit of this kind to be as follows:

> "The principal object of the suits, as is said in one of the briefs, is to test the validity of these asserted rights, and, if they be found invalid, to require the defendants to conform to the legislation of Congress, or, at their option, to remove from the Government lands."

That case involved the right of a power and light company and this Court found that it was a trespasser upon Government land because it was occupying the surface thereof without legal right so to do, and yet there was no attempt to enjoin such further trespass so as to confiscate property placed on Government land without legal rights to do so.

In *Chicago, Milwaukee & St. Paul Railway Co.* v. *United States*, 244 U. S. 351, 61 L. Ed. 1184, this Court said (p. 359):

> "The decree unconditionally commands the execution and filing of the prescribed stipulation without awarding an alternative injunction and counsel for the Government suggests that it should have enjoined the company from the further occupation of the Reserve, unless, within a prescribed time, the stipulation be executed and filed. The criticism is not without merit, and doubtless is prompted by a careful study of the bill. But, as the Government has not appealed and the company is not complaining of the failure to put the matter in the alternative, the point may be passed without further notice."

We are here complaining of the failure of the Court of Appeals to direct the Trial Court to issue the injunction—if it is to be finally issued—in the alternative, and we contend that the injunction ordered by the Court of Appeals should have been in the alternative, to wit, that unless within a time to be fixed by the Trial Court the pipe line company should procure authority from the proper officials representing the United States to occupy the surface of the Naval Reserve with its pump station, equipment and pipe line, or failing so to do, to remove its property placed on Government land without right, that then and only then

should it be enjoined from further trespass or occupation of the Government lands, being Naval Reserve No. 3.

The effect of the injunction as ordered by the Court of Appeals without any alternative therein, will be that this common carrier pipe line in possession of a portion of the Reserve is enjoined from further use, possession or trespass; if it goes upon the land after such injunction is issued to remove its property placed thereon, it will be in contempt of the Court issuing such injunction and the pipe line system will not only cease to operate as a public carrier but will forfeit property for which it invested in excess of $700,000 and such property will be confiscated by the United States, merely because it constructed its pump station and main line upon Government land believing it had the right to do so.

As to Sinclair Crude Oil Purchasing Company.

The record discloses, as found by the Court of Appeals, that Sinclair Crude Oil Purchasing Company as the vendee or assignee of Mammoth Oil Company purchased seventeen (17) steel oil storage tanks on Naval Reserve Number 3 (R. p. 850), and became substituted as to the rights of the Mammoth Oil Company to maintain the same before any attempt was made or action taken to rescind the lease contract of April 7, 1922; while the Court of Appeals finds that Sinclair Crude Oil Purchasing Company was evidently controlled by Mr. Sinclair, there is no evidence in the record to justify such inference or assumption of control as the record shows that the stock of the Sinclair Crude Oil Purchasing Company was owned one-half by the Standard Oil Company of Indiana and one-half by Sinclair Consolidated Oil Corporation and the same ruling is made with reference to the right of Sinclair Crude Oil Purchasing Company to have an ac-

counting against the Government for the value of the tanks so purchased by it, although no contention was made in either Court that it would be entitled to any such accounting.

While this corporation is not a common carrier, we contend that the injunction ordered by the Court of Appeals to be granted by the Trial Court, even if an injunction were proper to be ordered, should also have been in the alternative so that such corporation would be given a reasonable time to cease trespassing upon Government land by removing the property it had purchased and constructed thereon in good faith, even though the Court finds it was a trespasser in so doing.

Conclusion.

We submit that a Writ of Certiorari should be granted, as prayed, upon the grounds stated in the petition.

Respectfully submitted,

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